

Decision PROPOSED DECISION OF ALJ FITCH (Mailed 7/13/2018)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California Water
Service Company (U60W) for a
Certificate of Public Convenience and
Necessity to Provide Water Service to
Travis Air Force Base and to Establish
Rates.

Application 17-05-022

**DECISION DENYING CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO SERVE TRAVIS AIR FORCE BASE**

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DECISION DENYING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO SERVE TRAVIS AIR FORCE BASE

Summary

This decision denies the request by the California Water Service Company (Cal Water) for a certificate of public convenience and necessity (CPCN) to serve the Travis Air Force Base (AFB). The decision finds that while the Commission has the authority to authorize a CPCN for this service, we are not required by law to do so. In this instance we choose not to for policy reasons, because no public purpose would be served by the granting of the CPCN. Cal Water may provide service to Travis AFB under a contractual arrangement with the U.S. Department of Defense through an existing or new non-regulated affiliate under the Commission's rules for affiliate transactions for water companies. However, Cal Water may not hold itself out as providing service to the public in areas on or surrounding the Travis AFB without separate authorization from the Commission. This proceeding is closed.

1. Procedural Background

On May 15, 2017, California Water Service Company (Cal Water) filed an Application, seeking a Certificate of Public Convenience and Necessity (CPCN) to provide potable water service to Travis Air Force Base (AFB) and to establish rates for this service under the Commission's jurisdiction. The Office of Ratepayer Advocates (ORA) protested the application on July 7, 2017, and Cal Water filed a reply to the protest on July 17, 2017.

A prehearing conference (PHC) was held on September 5, 2017 to determine parties, discuss the scope and schedule, and discuss other procedural matters. A scoping memo was issued on September 19, 2017.

On September 28, 2017, ORA filed a motion to suspend the procedural schedule, along with a concurrently filed motion to dismiss the application. Cal Water filed a response to the motion to suspend the procedural schedule on October 2, 2017.

On October 3, 2017, the Administrative Law Judge (ALJ) issued an e-mail ruling denying the ORA motion to suspend, but instead revising the procedural schedule. Included in this ALJ Ruling was an amendment to the scope of the proceeding, to allow testimony to address the issue of potential service to the communities surrounding the Travis AFB.

On October 11, 2017, ORA filed a motion to vacate the ALJ e-mail ruling on a motion to suspend current procedural schedule, arguing that Cal Water's October 2, 2017 response to ORA's motion to suspend the procedural schedule improperly attempted to introduce new evidence via an attachment to that filing.

On October 13, 2017, Cal Water filed a response to the ORA motion to vacate the ALJ ruling, as well as a separate response to the ORA motion to dismiss the application.

On October 23, 2017, ORA filed a reply to the response of Cal Water to the ORA motion to dismiss the application, both a public version and a confidential version.

On November 8, 2017, both Cal Water and ORA filed motions to request evidentiary hearings.

On November 15, 2017, an amended Scoping Memo was issued, denying the ORA motion to dismiss and granting the motions for evidentiary hearings.

Evidentiary hearings were held on November 20, 2017.

On December 7, 2017, concurrent opening briefs were filed by ORA and Cal Water. On December 22, 2017, both parties filed reply briefs.

Also on December 22, 2017, ORA filed a motion to mark and admit late-filed exhibit ORA-4, which contains an updated response of Cal Water to an ORA data request. Cal Water responded to ORA's motion on Exhibit ORA-4 on January 8, 2018, and ORA filed a reply on January 23, 2018.

On December 26, 2017, ORA filed a motion for evidentiary sanctions against Cal Water, to which Cal Water responded on January 10, 2018, and ORA replied on January 23, 2018.

On February 9, 2018, Cal Water filed a motion for additional evidentiary hearing, if necessary. On February 26, 2018, ORA filed a response to the motion for additional evidentiary hearing, opposing the motion. On May 3, 2018, an ALJ Ruling was issued denying the motion for additional evidentiary hearing.

The case was submitted as of the May 3, 2018 ALJ Ruling. This decision affirms all rulings by the assigned Commissioner and ALJ in this proceeding.

2. Substantive Background on Cal Water's Request

Travis AFB is a Department of Defense military base located in Solano County, California, near Cal Water's existing Dixon service area. In October 2012, the Department of Defense issued a Request for Proposal (RFP) for privatization of the water distribution system at Travis AFB.

After Cal Water submitted its proposal to the RFP, the contract was awarded to Cal Water on September 29, 2016 through the federal government's bid process to provide water services to Travis AFB for a term of 50 years. Under the terms of the contract, Cal Water would assume ownership, operation, and maintenance of the water distribution system at Travis AFB, and operate it as a Commission-regulated service area, if this application is approved. Cal Water would not provide the actual water distributed to the Travis AFB; the water

would be separately sourced by the Department of Defense, with Cal Water responsible for testing and maintaining water quality.

The purchase price of the water distribution system is one dollar. Cal Water also proposes to make initial capital improvements to the water system in the amount of approximately \$12.7 million during the first five years, with an anticipated capital investment of approximately \$52 million over the 50-year term of the contract for utility service.

Cal Water filed this application consistent with the terms of the contract with the Department of Defense, to request a CPCN from the Commission in order to provide regulated water utility service to the Travis AFB, and to set rates for that service. Future ratemaking would be handled through Cal Water's regular general rate case process.

3. Late Filed Exhibit ORA-4

3.1. Motion and Responses/Replies

On December 22, 2017, ORA filed a motion to mark and admit late-filed exhibit ORA-4, which consists of a Cal Water update to a previous data request from ORA, detailing information and interactions about the possibility of extending water service to Georgetown Village apartments, which are located adjacent to Travis AFB. The data response includes correspondence with representatives of Hunt Investment Management (Hunt Companies), the owner/operator of the apartment complex. The exhibit would be late-filed because it was submitted after the close of evidentiary hearings and concurrent with reply briefs.

On January 8, 2018, Cal Water responded to ORA's motion, opposing the inclusion of Exhibit ORA-4 as irrelevant, because Cal Water is not seeking to

provide service to the Georgetown Village apartments at this time in this proceeding.

ORA replied to Cal Water's response on January 23, 2018, providing a detailed chronology of this proceeding, including the following:

- 9/28/17 – ORA files its *Motion to Dismiss*, which argued among other things, that Cal Water's proposed service of Travis Air Force Base does not comply with requirements in serving as a "public utility."
- 9/28/17 – ORA files its *Motion to Suspend the Current Procedural Schedule*.
- 10/2/17 – Cal Water responds to ORA's Motion to Suspend the Current Procedural Schedule and attaches a letter dated 9/28/17 from Hunt Companies expressing interest for Cal Water to serve its Georgetown apartment complex.
- 10/3/17 – ALJ Fitch issues an email ruling that, among other things, expands the scope of the proceeding by allowing the Hunt letter into the record and including service to surrounding communities other than Travis Air Force Base.
- 10/3/17 and 10/5/17 – ORA issues Data Requests.
- 10/6/17 and 10/9/17 – Cal Water responds to ORA data requests and includes correspondence and emails with Hunt.
- 11/14/17 – ORA issued a Subpoena for Mr. James Dobbie of Hunt Companies, Inc., to appear at Evidentiary Hearings set for November 21, 2017.
- 11/15/17 – *Assigned Commissioner and Administrative Law Judge Ruling Amending Scoping Memo, Denying Motion to Dismiss, and Granting Motions for Evidentiary Hearings* is issued. This Ruling amended the scope of the proceeding to include: "Does California Water Service Company plan to provide water service to communities surrounding the Travis Air Force Base?"

- 11/20/17 – Evidentiary Hearings held, including discussion of communications with Hunt Companies.
- 12/6/17 – Cal Water updates its responses to ORA data requests, including additional correspondence between Cal Water and Hunt Companies.

3.2. Discussion

As pointed out by ORA and demonstrated by the chronology offered in their reply to Cal Water's response to the ORA motion, the question of Cal Water's intention to serve customers other than Travis Air Force Base has been among the main disputed issues in this proceeding. ORA originally raised the issue with respect to requirements for community outreach in the Commission's consideration of whether Cal Water has met the criteria for the granting of a CPCN. Cal Water's inclusion of the September 28, 2017 letter from Hunt Companies in its response to ORA's *Motion to Dismiss* originally created the focus on this issue.

Thus, the additional information provided in Exhibit ORA-4 is certainly relevant to the resolution of this proceeding. We therefore grant ORA's December 22, 2017 motion to mark and admit late-filed exhibit ORA-4. The weight and importance of this exhibit is discussed later in this decision.

4. Commission Jurisdiction to Issue CPCNs

The first issue in this case is whether the Commission has the jurisdiction to issue a CPCN for Cal Water to provide potable water service to the Travis Air Force Base.

The portions of the Public Utilities Code that govern issuance of CPCNs are Sections 1001 and 1002.¹ Section 1001 states as follows:

1001. No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, water corporation, or sewer system corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission, on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

¹ All further references herein are to the Sections of the Public Utilities Code unless otherwise indicated.

Section 1002 states:

1002. (a) The commission, as a basis for granting any certificate pursuant to Section 1001 shall give consideration to the following factors:

- (1) Community values.
 - (2) Recreational and park areas.
 - (3) Historical and aesthetic values.
 - (4) Influence on environment, except that in the case of any line, plant, or system or extension thereof located in another state which will be subject to environmental impact review pursuant to the National Environmental Policy Act of 1969 (Chapter 55 (commencing with Section 4321) of Title 42 of the United States Code) or similar state laws in the other state, the commission shall not consider influence on the environment unless any emissions or discharges therefrom would have a significant influence on the environment of this state.
- (b) With respect to any thermal powerplant or electrical transmission line for which a certificate is required pursuant to the provisions of Division 15 (commencing with Section 25000) of the Public Resources Code, no certificate of public convenience and necessity shall be granted pursuant to Section 1001 without such other certificate having been obtained first, and the decision granting such other certificate shall be conclusive as to all matters determined thereby and shall take the place of the requirement for consideration by the commission of the four factors specified in subdivision (a) of this section.

Usually, when considering applications for CPCNs, the Commission looks to Section 1002, requiring consideration of the following factors included therein:

1) community values, 2) recreational and park areas, 3) historical and aesthetic values, and 4) influence on the environment.

4.1. Cal Water's Position

Cal Water's position in this proceeding has been that this is a routine matter that is not proposing anything materially different from regulated services offered in its other districts. Cal Water generally asserts that it has met all of the requirements for the issuance of a CPCN, and that the Commission should grant the request.

Further, Cal Water argues that nothing in the Public Utilities Code prevents granting of a CPCN for this service, and none of the provisions of its contract with the U.S. Department of Defense would conflict with Commission authority or precedent.

In addition, Cal Water argues that the Department of Defense in this case will "simply be one more public utility customer"² to be treated as any other customer served by regulated water service.

4.2. ORA's Position

ORA argues that Cal Water has not met the terms of Sections 1001 and 1002 of the Public Utilities Code. ORA believes that Section 1001 provisions require construction of a new water system or extension of an existing system for granting of a CPCN, neither of which is proposed in this case.

ORA also argues that Cal Water has failed to provide information adequately addressing the requirements of Section 1002, related to 1) community values, 2) recreational and park areas, 3) historical and aesthetic values, and 4) influence on the environment. ORA's original protest pointed out that Cal Water failed to provide evidence that it had undertaken any type of community outreach prior to filing this application, and that a simple assertion

² Cal Water Application at 4.

of the transfer being exempt from the CEQA is not proof of eligibility for such an exemption.

4.3. Discussion

While ORA is correct that the plain language of Section 1001 discusses construction or extension of facilities in order to obtain a CPCN, we are not convinced that Section 1001 prohibits the issuance of a CPCN in this case. We can envision uncommon situations where physical water conveyance and delivery assets are proposed to be acquired by regulated entities where the assets were not in use for public purposes prior to that acquisition. We believe the Commission has the option to grant a CPCN in such cases even if there is no further construction or extension proposed. Thus, our decision here does not hinge on ORA's narrow reading of Section 1001.

As to Section 1002, ORA is also correct that Cal Water made an inadequate showing with respect to the requirements of this section. Cal Water asserted that community outreach was unnecessary since service proposed did not involve any community outside of Travis AFB, and also asserted that the application fell under an exemption from CEQA. Cal Water did not address the other two elements of Section 1002 at all, even to state that the CEQA exemption covers them.

At a minimum, we expect CPCN applications to address the requirements of Section 1002 and, in particular, we expect that any entity claiming a CEQA exemption will at least provide a citation to the authority for such an exemption. Thus, we find that Cal Water did not meet its burden for showing compliance with the requirements of Section 1002 for purposes of the granting of a CPCN. This situation could potentially be remedied by Cal Water if the Commission was inclined to grant a CPCN in this case. As discussed further below, we are not

granting a CPCN, for multiple other reasons in addition to Cal Water's failure to make a sufficient showing for purposes of Section 1002.

5. Definition of Public, Public Utility, and Dedication of Facilities to Service the Public

Additional issues relevant to our consideration of this case are related to the definition of what constitutes the "public" and a "public utility." These definitions are contained in Sections 207 and 216.

Section 207 states:

"Public or any portion thereof" means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered.

Section 216(a) states:

"Public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.

In addition, the other factor usually considered by the Commission in deciding whether to issue a CPCN is whether the company has dedicated utility facilities to public use. The Commission has stated that the test to determine whether dedication has occurred is:

...whether or no [a person has] held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, as contradistinguished from his holding himself out as serving or

ready to serve only particular individuals, either as [an] accommodation or for other reasons peculiar and particular to them.³

5.1. Cal Water's Position

Cal Water argues that a CPCN should be granted here because in serving the Travis AFB, Cal Water would be providing service to the military base and treating the U.S. Department of Defense just like any other water utility customer. The application makes it clear that the sole customer will be the Travis AFB in the event of the granting of the CPCN.

Cal Water likens serving the military base to serving a gated community or a private golf course, where public access is restricted but the customer is nonetheless a utility ratepayer like any other. Thus, Cal Water argues that it would be serving as a public utility providing service to the Travis AFB, similar to the service provided in its other districts.

In addition, Cal Water argues that should the CPCN be granted, Cal Water would have dedicated the Travis system to serving the public, and that it is in the public interest for Cal Water to provide this regulated water service to the Travis AFB. Cal Water represents that the express language of the contract with the Department of Defense, as well as the actions of Cal Water in seeking a CPCN through this application, provide a basis for finding that there would be dedication of utility facilities to serving the public. Though Cal Water plans only

³ D.11-12-056, *In the Matter of the Application of the Nevada Hydro Company for a Certificate of Public Convenience and Necessity for the Talega-Escondido/Valley-serrano 500 kV Interconnect Project*, Order Denying Rehearing of Decision (D.) 11-07-036, at 9, citing *Independent Energy Producers Association, Inc. v. State Board of Equalization*, 125 Cal.App.4th 425, 442-443 (2004).

to serve Travis AFB at the present time, they represent that they could serve the broader public beyond Travis AFB in the future.

5.2. ORA's Position

ORA argues that Cal Water, if granted a CPCN to serve the Travis AFB, would not be serving the "public or any portion thereof" as defined in Sections 207 and 216. In particular, ORA argues that the federal government does not fall under the definition of "public" included in Section 207. Thus, by definition, ORA does not believe that Cal Water could be dedicating utility assets to serving the public since the U.S. Department of Defense is not part of the public.

5.3. Discussion

ORA is correct that Section 207 does not explicitly include the federal government in the definition of "public or any portion thereof." However, almost every utility regulated by the Commission serves a group of customers in the state where some subdivision of the federal government is treated simply as another utility customer, similar to other commercial customers. Thus, we do not believe that Sections 207 and 216 would prohibit our issuance of a CPCN for these reasons. Similarly, since Cal Water's representations in this case and evidence contained in Exhibit ORA-4 provide ample reason to believe that Cal Water intends to dedicate the water system on Travis AFB to public service, our policy on dedication of utility assets also would not prohibit issuance of a CPCN here.

The difference in this situation, however, for purposes of service to Travis AFB, is that the U.S. Department of Defense would be the only utility customer in this district, coupled with the fact that the award of this service to Cal Water would be implemented via a contractual arrangement with the Department of

Defense. This raises questions about the exercise of the Commission's regulatory authority given provisions of the contract between Cal Water and the Department of Defense. These issues are discussed in the next section.

6. Potential for Conflict of Authority

In this application, Cal Water included a copy of the contract signed between Cal Water and the U.S. Department of Defense when the privatization of the water system on Travis AFB was awarded to Cal Water. The contract includes, among other provisions, the ability for the Department of Defense contract officer to approve additional connections or disconnections, as well as consent to system upgrades and capital investments.

The federal government also retains ownership over the actual water to be conveyed through the infrastructure that would be owned and operated by Cal Water under the CPCN, if granted as requested in the application.

Finally, the contract contains provisions for the federal government to re-establish ownership of the water system at the end of the 50-year contract, at its sole discretion.

6.1. Cal Water's Position

Cal Water represents that the contract between itself and the U.S. Department of Defense is a standard contract that the federal government has used to award other privatized systems on military bases throughout the country. In Cal Water's view, should the Commission grant a CPCN in this case, the Commission would have sole authority over all retail rates, rate schedules and items directly related to rates and rate issues through Cal Water's general rate case, and the federal government would become simply a ratepayer.

Cal Water also argues that the Commission has never imposed a minimum number of customers for regulated utility service and therefore it is immaterial

that the Department of Defense happens to be the only customer to be served by Cal Water's proposed district.

Cal Water's witness represented at the evidentiary hearing that if the federal government objected to the Commission's ratemaking or capital investment decisions, it could intervene in the Cal Water rate case just like any other customer of the utility and make its case before the Commission. Cal Water deems it extremely unlikely that there would arise a conflict between the Department of Defense's contract officer and the Commission's rate case process. However, Cal Water represents that the Commission would be the primary authority with respect to ratemaking issues.

Finally, Cal Water's position is that ownership of the actual water to be delivered remaining with the federal government is similar to other arrangements in other districts where Cal Water is responsible for water conveyance but not supply of the water itself.

6.2. ORA's Position

ORA is concerned that the presence of a contractual arrangement between the federal government and Cal Water could, at best, create potential for conflict between federal and state law and, at worst, set up a situation where the Commission is delegating its authority to the Department of Defense contract officer. ORA points to the supremacy clause of the U.S. Constitution, with concerns that any conflict between the Department of Defense contract and the Commission's regulatory authority would automatically result in limitations on the Commission's authority.

ORA also questions the legal arrangement whereby Cal Water does not own but only conveys the water to be distributed within Travis AFB.

6.3. Discussion

As discussed earlier, it is not unusual for a water utility regulated by the Commission to serve a utility customer that also happens to be a subdivision of the federal government. Cal Water is correct that there is no Commission policy or law that requires that the number of customers in a water district must be greater than one. But it is unusual, in combination, for the U.S. Department of Defense to be the sole utility customer of a district and for the provision of service to be governed by a contractual arrangement with provisions that potentially compete with the Commission's regulatory authority on many issues, but especially rates and ratemaking.

At the same time, it is hard to imagine the Supremacy Clause of the U.S. Constitution coming into play, because it is highly unlikely that the Commission would order something in a general rate case that would be in direct conflict with federal law. More likely, this is a practical consideration related to how decisions made by the Department of Defense contract officer might conflict with investment decisions to be made by the Commission under its ratemaking authority. In this sense, ORA has a valid point that actual conflicts could arise where it is unclear which authority has primacy. Cal Water, in evidentiary hearings and briefs, attempted to downplay the importance of certain standard provisions in the federal government contract, but there still remains the question of what would happen should a Commission order conflict with a contract provision.

It is in this area where we pause to consider what public interest would be served by the granting of a CPCN in this proceeding. Cal Water argues that the public interest is in the benefits of transparency and oversight that come with public utility status under the Commission's jurisdiction. They also point to the potential for economies of scale benefiting not only the Travis AFB, but also

existing Cal Water customers, through a larger customer base and fees that would be paid by the Travis AFB as a regulated utility customer.

While theoretically and legally, as discussed above, we are not prohibited from granting a CPCN here, the benefits of regulation leading to transparency, as well as the addition of one more customer to Cal Water's customer base, do not outweigh the negative potential for conflicts between the Commission's regulatory process and the Department of Defense contract. Ordinarily, the Commission's regulatory and ratemaking authority is established through the granting of a CPCN in order to ensure just and reasonable rates to all members of the public taking regulated utility service within a particular geographic area covered by the CPCN.

In this case, there is only one customer being served, and that customer already has protections in place, as the sole ratepayer, in the form of a contractual relationship with the water company. The Travis AFB is not open to the public and any additional service connections within the geographic area covered by the AFB would be under the control of the federal government's contract officer.

While the Commission, if it exercised its regulatory authority, could substitute its judgment on the reasonableness of cost components of Cal Water's service or capital investments to the water system on Travis AFB, the U.S. Department of Defense already has the ability to protect its interests via the provisions of the contract already in place. Thus, we see no public purpose or customer protection purpose being served by the Commission asserting authority and granting a CPCN here.

On the issue of ownership of the water to be delivered to the Travis AFB, we see no particular issue with the federal government retaining ownership of

the water commodity, since, as Cal Water points out, not all water distribution or conveyance utility operations include water commodity provision as part of the service. But we do not need to reach a conclusion on this arrangement here since we are not granting a CPCN. The ownership of the water remains with the federal government as a provision of the contract between the Department of Defense and Cal Water and we do not see any prohibition on that arrangement.

7. Commission Precedent for Policy on Water Service to Military Bases

Another question raised in the record of this proceeding is whether the Commission already has established policy about how privatized water service should be provided on military bases in California.

7.1. Cal Water's Position

Cal Water would prefer to operate the water service on Travis AFB through a CPCN under the regulation of the Commission. This was clear with the filing of this application, and Cal Water represents that the provision of regulated service under Commission regulatory authority was one of the key reasons why Cal Water was the winning bidder for the contract with the U.S. Department of Defense in the first place. Cal Water points to a decision by the Kentucky Public Service Commission regarding the Hardin County Water District, where the Fort Knox military installation water services were being privatized, and the water service was determined to be provided under the state's regulatory authority. Cal Water points to this case as illustrative, though acknowledges that it is not binding on this Commission.

7.2. ORA's Position

ORA's position is that a CPCN is not required in this situation for Cal Water to provide service to Travis AFB. ORA argues that the Kentucky case referenced by Cal Water is irrelevant to California. Instead, ORA cites to two instances in California where privatized water service is being provided on U.S. military bases by non-regulated affiliates of California water companies.

In one case, ORA references the current general rate case of California American Water Company (Cal-Am) (Application 16-07-002) where Cal-Am is providing service to the Vandenberg AFB through its non-regulated affiliate, American Water Enterprises, and the Commission is examining allocation of expenses between the General Office of the regulated utility and the non-regulated affiliate.

In the second case, Golden State Water Company (Golden State), through an affiliate of its parent company, American States Water, called American States Utility Services (ASUS), is serving various military installations in California and elsewhere.

ORA points out that the contract between the U.S. Department of Defense and Cal Water already includes provisions in the event that the Commission does not grant a CPCN in this case, whereby a fixed price contract would be negotiated and service would continue to be provided.

Thus, ORA argues that the Commission should not grant a CPCN, but instead should allow Cal Water to provide service to the Travis AFB either by: 1) referring the contract to one of its existing non-regulated affiliates; 2) creating a new non-regulated affiliate to provide the service; or 3) providing the service

under the Commission's rules Governing Affiliate Transactions and the Use of Regulated Assets for Non-Tariffed Utility Services.⁴

7.3. Discussion

Here we agree with ORA that a CPCN is not necessary to allow Cal Water to provide water service to Travis AFB. Cal Water is free to provide service under the terms of its contract with the U.S. Department of Defense as ORA suggests, through a new or existing non-regulated affiliate under the terms of the Commission's Affiliate Transaction rules for water utilities included in D.10-10-019.

8. Need for a CPCN to Serve Areas Adjacent to Travis AFB

In the record of this proceeding, as well as during the evidentiary hearings, a great deal was made of the question of Cal Water's intentions to serve areas adjacent to the Travis AFB, should a CPCN be granted in this case. This was the subject of the original letter from the Hunt Companies to Cal Water expressing interest in service to the Georgetown Village apartments, and the resulting disputes about the scope of this proceeding and the inclusion of Late-Filed Exhibit ORA-4 in the record.

8.1. Cal Water's Position

Cal Water's original application and subsequent representations in this proceeding have made it clear that the intention in this proceeding was to serve only the Travis AFB subject to the Commission's grant of a CPCN.

However, Cal Water also made it clear in its representations in this case that it may have the opportunity to add new customers to its proposed Travis

⁴ See the requirements of D.10-10-019.

District in the future, both on the Travis AFB and off the base, including privatized residential housing, a golf course, a school, and leased facilities, which it described in its supporting materials to the application in this proceeding.

It is also clear from Exhibit ORA-4 that Cal Water is also interested in the potential to serve areas adjacent to Travis AFB. But at this point, Cal Water characterizes the Hunt Companies and the Georgetown Village apartments as a potential customer not located within the service area proposed in this proceeding.

8.2. ORA's Position

ORA does not dispute that this application is for water service only to the Travis AFB and one customer, the U.S. Department of Defense. ORA is concerned, however, about Cal Water's potential interest in serving additional customers adjacent to the Travis AFB, should a CPCN be granted in this proceeding, and the steps that would be required for Cal Water to serve such customers, if a CPCN were to be granted.

8.3. Discussion

The scope of this proceeding was originally expanded to take in the original letter from the Hunt Companies about potential service adjacent to the AFB because ORA had raised the requirements of Section 1002 with respect to the "community values" in its protest. It initially appeared that Cal Water's purpose in attaching the letter to its response to ORA's motion to dismiss the proceeding was to demonstrate that there was support from the wider community for Cal Water's provision of service at Travis AFB. Cal Water's reply comments on the proposed decision clarified that the purpose was to address the issue raised by ORA about a CPCN to serve only one customer, with the intention of demonstrating that there could be other customers in the near future.

However, provision of the letter resulted in raising the broader question of Cal Water's intentions in the event of a CPCN being granted as requested, and the possible expansion of service to adjacent geographic areas.

To ensure no confusion going forward, given we are allowing Cal Water to provide service to Travis AFB via a non-regulated affiliate and under the provisions of our rules related to affiliate transactions, we state affirmatively that if Cal Water wishes to serve any customers in areas outside the geographic boundary of Travis AFB and the proposed service area at issue in this application, with regulated service, a new application for a new CPCN is required.

9. Summary of CPCN Conclusion

In sum, while it is within the discretion of the Commission to grant a CPCN in this proceeding, we choose not to do so because it would not serve any public purpose or protect any member of the public. The terms of Cal Water's service to the U.S. Department of Defense are defined in their bilateral contract and thus there is no reason for the Commission to assert ratemaking authority for the purposes of protecting the U.S. Department of Defense, which granted the contract to Cal Water in the first place. In addition, Cal Water has not met its burden to show how it complies with the terms of Section 1002 of the Public Utilities Code.

Thus, we will not grant a CPCN in this proceeding, but instead will allow Cal Water, should it choose to do so, to provide the water distribution service to Travis AFB under contract with a new or existing non-regulated affiliated company, operating in compliance with the requirements of D.10-10-019, which sets forth our rules for affiliate transactions for water companies.

10. ORA Motion for Evidentiary Sanctions

On December 26, 2017, ORA filed a motion seeking “evidentiary sanctions” against Cal Water for alleged misrepresentations in this proceeding related to the progress of communications between Cal Water and Hunt Companies with respect to the potential for serving the Georgetown Village apartment complex. ORA accuses Cal Water of withholding evidence until after discovery was completed and until just before briefs were due in this case, effectively depriving ORA of the ability to conduct additional discovery and cross-examine Cal Water’s witness in hearings on this issue. ORA also asserts that Cal Water effectively misled the Commission during the evidentiary hearings by misrepresenting the status of conversations with Hunt Companies about potential water service.

ORA’s proposed remedy is an “adverse inference” or an assumption by the Commission of the worst possible facts against Cal Water. Essentially, ORA would like the Commission to ignore any evidence in this case related to the potential for Cal Water to serve the Hunt Companies and their facilities adjacent to the Travis AFB.

10.1. Cal Water’s Response

Cal Water responds that it updated its data request responses to ORA at the direction of the ALJ during the evidentiary hearing, which was held November 20, 2017, the week of Thanksgiving. Cal Water asserts that holiday schedules and the necessity to review a great deal of correspondence resulted in provision of the additional material so close to the due date for briefs in the case.

Cal Water also represents that it has “gone well out of its way” to provide extra information to ORA in this proceeding, including with short response times.

Cal Water also strongly objects to the suggestion by ORA that Cal Water had intentionally or deliberately tried to prejudice ORA's case in this proceeding. In particular, Cal Water addresses certain statements by its witness, Mr. Townsley, in written testimony and evidentiary hearing testimony, to explain the "introductory" and "preliminary" nature of Cal Water's discussions with the Hunt Companies. Cal Water sticks to this characterization, noting that Cal Water had only received one letter expressing interest in the potential for Cal Water to serve the Georgetown Village apartments.

10.2. ORA's Reply

ORA's reply to Cal Water's response to the ORA motion for evidentiary sanctions contends that Cal Water had a continuing obligation to provide updated information to ORA related to its data requests, regardless of the timing of the ALJ's ruling to require provision of that information during the evidentiary hearings.

ORA also reiterates that Mr. Townsley's testimony characterizing the Hunt Companies discussions as introductory and preliminary was misleading to the Commission and that the updated data request responses are relevant to this proceeding.

In addition, ORA recommends that the Commission consider issuing an Order to Show Cause why Cal Water should not be penalized for violating Rule 1.1 of the Commission's Rules of Practice and Procedure.

10.3. Discussion

ORA's motion and the whole set of issues related to the potential for Cal Water to serve the Hunt Companies' properties adjacent to Travis AFB is one of the more confounding issues in this proceeding, given that it occupied a great deal of attention.

On the one hand, Cal Water is correct in pointing out that this proceeding is addressing service to the Travis AFB and the Hunt Companies' properties are not part of the Travis AFB but rather adjacent to it and would not be served by either a CPCN granted in this proceeding or an affiliate company transaction as is approved in this decision. In that sense, the issue of potential future service to the Hunt Companies is indeed irrelevant to this proceeding.

On the other hand, Cal Water voluntarily introduced this issue into this proceeding, which Cal Water stated in its reply comments on the proposed decision was with the intention of demonstrating opportunities to serve other customers besides the Department of Defense, in response to ORA's argument that serving only one customer presented a legal barrier to issuance of a CPCN.

Thus, ORA has a valid point that Cal Water appears to be trying to have it both ways, utilizing the Hunt Companies' interest in Cal Water's regulated water service as support for its application, while simultaneously arguing that this expression of interest is irrelevant to the issues in the proceeding.

Nonetheless, all of the issues surrounding service to areas adjacent to the service area proposed in this application are effectively irrelevant to our decision in this case. However, we take allegations of misleading the Commission, intentionally or unintentionally, very seriously. While this issue did not end up being material to our decision in this case, that was not a settled issue at the time of the evidentiary hearings.

In those evidentiary hearings, Cal Water's witness was asked very specific questions about the status of discussion with the Hunt Companies, which were characterized as "introductory" and "preliminary" with only one letter expressing interest.

Evidence provided in Cal Water's updated response to ORA's data request, however, indicates a deeper level of engagement than this characterization would imply.

ORA had subpoenaed the signatory to the original letter from Hunt Companies to Cal Water to appear at the evidentiary hearings, and Cal Water characterized this as an overreach by ORA, since the individual was from out of state and the evidentiary hearings were taking place the week of Thanksgiving.

In subsequent evidence provided in the updated data request response contained in Exhibit ORA-4, it is clear that the same individual was, in fact, present in California at Cal Water's offices having detailed discussions about the potential for provision of water service, only the week before the evidentiary hearings were taking place. This information was known to Cal Water at the time of the evidentiary hearings and was not disclosed at that time.

Thus, Cal Water's witness, who by inclusion in numerous e-mails contained in the data request response appeared to be participating in the meetings the previous week, did appear to minimize or downplay the level of engagement occurring between the Hunt Companies' representatives and Cal Water.

We admonish Cal Water for this behavior and remind them of their obligation to be truthful and forthcoming with the Commission on all aspects of their engagement with the Commission, regardless of whether or not Cal Water deems the matter in question relevant to the ultimate disposition of the proceeding before the Commission. Rule 1.1 of the Commission's Rules of Practice and Procedure is paramount, stating that: "Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission... [is] never to mislead the Commission or its staff

by an artifice or false statement of fact or law.” Utilities whose representatives violate this Rule are subject to sanctions.

In this case, because we are not granting the CPCN requested by Cal Water and are also not making a finding with respect to the appropriateness of Cal Water serving the apartments owned by the Hunt Companies, the evidentiary sanction sought by ORA is effectively accomplished, though we do not take the formal step of making a finding that the evidence provided by Cal Water should be ignored. All of the discourse on this topic remains in the record of this proceeding, which could be useful should Cal Water propose to serve the Hunt Companies’ properties adjacent to the Travis AFB in the future. However, the original motion of ORA for evidentiary sanctions is denied as moot.

We also decline to initiate a process for potentially imposing penalties for violation of Rule 1.1 in this case, as requested by ORA. We note that Cal Water did make a motion for additional evidentiary hearings, which was denied, in part to attempt to clear up confusion surrounding this issue, which we consider a mitigating factor. We do, however, put Cal Water on notice that should we see similar behavior in the future with data responses and other testimony that is less than forthcoming about the facts of a case, we will consider penalties at that time. We intend to be vigilant in monitoring this type of behavior in Cal Water’s future proceedings before us.

11. Comments on Proposed Decision

The proposed decision of ALJ Fitch in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure.

Comments were filed on August 2, 2018 by Cal Water and ORA.

Reply comments were filed on August 7, 2018 by Cal Water and ORA.

Cal Water, in its opening comments, agrees with the legal conclusions in the proposed decision, but disagrees with the policy conclusion that granting the CPCN would not have adequate public purpose benefits.

In particular, Cal Water claims that the decision undervalues three sets of actual and potential benefits to its customers of granting the CPCN for a separate Travis District, including:

- Allocating overhead and expenses of Cal Water, including information technology, human resources, legal and engineering costs, to the Travis District, thereby decreasing those costs for Cal Water's other customers in other districts.
- Creating rate contributions from the Travis District that would support existing Rate Support Fund and Low-Income Ratepayer Assistance programs in all Cal Water districts.
- Regulatory oversight exercised through a CPCN, resulting in transparency and a reduced risk of cross-subsidization.

ORA, in its reply comments, argues that the allocation of overhead costs for Cal Water is outside of the scope of the proceeding and therefore Cal Water cannot argue these facts now, since the record was not developed. On the subject of increasing contributions to surcharges, ORA's reply comments argue that there would be no such effect because the surcharges are applied to water commodity charges, and in this case, Cal Water would not be supplying the water. Finally, ORA's reply comments point out that the purpose of the Commission's rules for affiliate transactions is to create the transparency that Cal Water touts in its comments.

On the issue of allocation of overhead expenses, the scoping memo in this proceeding ruled out of scope the issue of the reasonableness of those expenses, but not their allocation among customers. On the issue of surcharge contributions, the facts are clearly disputed. However, even if we accept Cal Water's assertions on both issues, they are not enough to tip the balance in favor of the public interest of the Commission issuing a CPCN in this case. The primary public interest we are weighing with the issuance of any CPCN is related to the consumer protection offered by our regulation for the customer being served under the new CPCN. The fact that Cal Water is arguing in favor of cross-subsidies for its customers in other districts as the primary benefits of regulated service for this Department of Defense customer only underscores the point that no public purpose or customer protection purpose would be served by our regulation that would benefit the federal government.

Finally, we agree with ORA that the purpose of the Affiliate Transactions Rules for water companies is to create the transparency benefits normally afforded by our regulation. Ordinarily, our presumption is in favor of provision of regulated services instead of unrelated ones. But this case is unique, in that the single customer to be served is already protected by a contractual arrangement, and there does not appear to be any additional benefit to our granting of a CPCN to protect the Department of Defense. If anything, Cal Water's cross-subsidy arguments weigh against it being in the interest of the Department of Defense to take regulated service from Cal Water.

Cal Water's opening comments also state that it does not have an existing, staffed non-regulated affiliate ready to provide service as contemplated in this decision, and would be "starting from scratch" with respect to creating, staffing, and supporting a non-regulated affiliate.

ORA's reply comments dispute this factual assertion, pointing to the web site of Cal Water's parent company, which includes information about an affiliate company.

Resolving this factual dispute is not necessary here, because we do not require Cal Water to provide service to Travis AFB through an affiliate. We merely allow it, should Cal Water choose to do so, and if so, those affiliate services would be subject to the Commission's rules about affiliate transactions for water companies.

ORA's opening comments disagree with the proposed decision's conclusion that the Commission has the discretion to issue a CPCN in this case, characterizing Section 207's omission of the federal government entities as "not inadvertent." ORA argues that the Commission has never granted a CPCN to a company to serve only one federal government customer. Thus, ORA continues to argue that because of the contractual arrangement here, the Commission would lack independent legal authority to regulate this transaction as envisioned by the Public Utilities Code.

If we agreed with ORA's arguments here on interpreting Section 207, it would seem to call into question the legal status of provision of regulated utility service to any federal government customer. Thus, we do not accept ORA's conclusions on this point.

With respect to the requirements of Section 1002 for the granting of a CPCN, Cal Water's opening comments dispute that it has not met its burden, in part by citing to a past case where the Commission concluded that CEQA review was unnecessary for the issuance of a CPCN to an existing water system. Cal Water also makes reference to the CEQA guidelines allowing the exemption.

The issue here is not whether a CEQA exemption is warranted or not (the Commission is not stating that a CEQA review would have been required in this instance), but rather that Cal Water made scant reference even to the requirements in its original application. Including the relevant legal requirements and references to past cases in the comments on the proposed decision is not equivalent to meeting the initial burden to show that the exemption is warranted in the first place. Thus, we do not modify this conclusion.

Cal Water's opening comments also continue to argue that ORA's motion for evidentiary sanctions and request for an Order to Show Cause why Cal Water should not be penalized for violating Rule 1.1 of the Commission's Rules of Practice and Procedure are inappropriate and unnecessary because Cal Water's witness did not intend to mislead the Commission, and that the confusion resulted from different definitions of what constituted "introductory" and "preliminary" conversations with a potential future customer.

ORA's reply comments, on the other hand, argue that it is legal error for the Commission not to issue an order to show cause, and impose penalties, because Rule 1.1 does not require "intent" to mislead the Commission for the rule to be violated. ORA is correct that an intent to mislead is not required to prove a violation of Rule 1.1. However, the Commission still has the discretion to decide whether to initiate a penalty phase of this proceeding or not.

In this case, Cal Water's reply comments clarify that the purpose in including the original letter from the Hunt Companies in the record was not to establish community support, but rather to show that there would be future interest in water service, to address ORA's concerns about serving only one

customer with a CPCN. We have made a change in the body of this decision to reflect this clarification by Cal Water.

We also note that Cal Water did make a motion for additional evidentiary hearings in order to attempt to clarify some of these points, constituting an effort to remedy a mistake, which ORA's opening comments acknowledge could be a mitigating factor in determining whether penalties are appropriate. The motion for additional hearings was denied by the ALJ, who judged that the record was sufficiently clear on this issue and did not warrant additional hearing time. For all these reasons, this decision continues to hold that an order to show cause is not warranted in this particular set of circumstances, notwithstanding the seriousness of the requirements of Rule 1.1.

12. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Julie A. Fitch is the assigned ALJ in this proceeding.

Findings of Fact

1. Cal Water was the recipient of an award of a contract through the federal government's request for proposal process for privatization of the water distribution system at Travis Air Force Base.

2. The term of the contract between the U.S. Department of Defense and Cal Water is 50 years. At the end of the contract term, the U.S. Department of Defense may, at its sole discretion, re-establish ownership of the water system.

3. The purchase price of the water distribution system transfer from the U.S. Department of Defense to Cal Water is one dollar.

4. Under the terms of the contract between Cal Water and the U.S. Department of Defense, Cal Water would assume ownership, operation, and maintenance of the water distribution system at Travis AFB.

5. Cal Water would not be responsible for providing the water supplied through the distribution system at Travis AFB.

6. Under the terms of the contract between Cal Water and the U.S. Department of Defense, the federal government's contract officer has certain authorities, among them consenting to additional connections or disconnections from the water distribution system, as well as system upgrades and capital investments.

7. Cal Water proposes to serve only the Travis AFB, represented by one customer, the U.S. Department of Defense, under this application.

8. The Georgetown Village Apartments owned by the Hunt Companies and adjacent to the Travis AFB would not be served as part of the contract between Cal Water and the U.S. Department of Defense or under the proposed CPCN in this proceeding and Cal Water has not sought permission to serve this set of customers in this application.

9. Cal Water's intention to serve customers outside of or adjacent to Travis AFB in this proceeding has been a disputed issue emanating from Cal Water's attachment of a letter from the Hunt Companies to Cal Water expressing interest in water service to its response to ORA's motion to suspend the procedural schedule.

10. The Commission evaluates applications for CPCNs according to Sections 1001 and 1002 of the Public Utilities Code.

11. Cal Water's application asserted that it met the terms of Section 1002 but did not provide any detailed analysis of how.

12. Section 207 defines "public" for purposes of a CPCN and the U.S. Department of Defense could be considered a member of the public.

13. Section 216(a) defines “public utility” and the Travis AFB water distribution system owned and operated by Cal Water could qualify under this definition.

14. The Commission requires dedication of utility facilities to public use prior to issuance of a CPCN.

15. The Commission’s regulatory oversight is usually exercised for purposes of protecting public utility ratepayer interests.

16. The Kentucky Public Service Commission has established regulatory authority over a privatized military installation water service at Fort Knox.

17. The Commission is currently evaluating arrangements where two water utilities in California are providing service at military bases in California under contract via non-regulated affiliate transactions.

18. Cal Water’s witness was not fully forthcoming about the number and detailed nature of exchanges occurring between Cal Water and the Hunt Companies representatives about potential service to the Georgetown Village apartment complex adjacent to the Travis AFB.

Conclusions of Law

1. ORA’s December 22, 2017 motion to mark and admit late-filed Exhibit ORA-4 should be granted to allow more detailed consideration of the issues related to Cal Water’s plans or intentions to serve additional customers adjacent to the Travis AFB and its obligations for community outreach.

2. Under the requirements of Section 1001 of the Public Utilities Code, the Commission is not prohibited from issuing a CPCN where there is no construction of facilities or extension of service.

3. Cal Water did not meet its burden to show compliance with Section 1002 of the Public Utilities Code for purposes of issuing a CPCN.

4. Sections 207 and 216 of the Public Utilities do not prohibit the Commission from granting a CPCN in this proceeding.

5. There is no legal requirement or Commission precedent requiring that a utility district serve more than one utility customer.

6. Utility facilities could theoretically be dedicated to serving the public without serving more than one utility customer.

7. Ownership of water supply is not necessarily a requirement for a CPCN for water distribution service.

8. Commission regulatory authority over public utilities, through general rate cases and other regulatory oversight, serves to protect customer/ratepayer interests for the particular customers being served under the CPCN.

9. In this case, the U.S. Department of Defense has its own protections in place in the form of its bilateral contract with Cal Water.

10. Commission CPCN and ratemaking oversight of the contract between the U.S. Department of Defense and Cal Water would not serve any public or customer protection purpose.

11. Decisions of the Kentucky Public Service Commission about military water service privatization are not binding on this Commission.

12. The Commission has not established a general industry-wide policy on how privatized water service should be provided on military bases in California.

13. Decision 10-10-019 sets forth the requirements of the Commission for affiliate transactions of water companies.

14. A CPCN is not required for Cal Water to operate the water distribution system at Travis AFB.

15. Cal Water may provide water distribution services at Travis AFB to the U.S. Department of Defense through a new or existing non-regulated affiliated company under the requirements of D.10-10-019.

16. If Cal Water wishes to serve customers in areas outside of the geographic boundary of Travis AFB and/or the area covered by its contract with the U.S. Department of Defense, Cal Water should be required to file a new application with the Commission.

17. Rule 1.1, pertaining to Ethics, of the Commission's Rules of Practice and Procedure, requires that: "Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission... never mislead the Commission or its staff by an artifice or false statement of fact or law."

18. ORA's December 26, 2017 motion for evidentiary sanctions against Cal Water is effectively moot, because the adverse inference that ORA seeks in the motion is accomplished by the Commission's decision to deny the request for a CPCN in this application.

19. All rulings of the assigned Commissioner and ALJ in this proceeding should be affirmed.

O R D E R

IT IS ORDERED that:

1. The December 22, 2017 motion of the Office of Ratepayer Advocates (ORA) to mark and admit late-filed exhibit ORA-4 is granted.
2. The application of the California Water Service Company for a certificate of public convenience and necessity to serve the Travis Air Force Base is denied.

3. The California Water Service Company may provide water distribution services to the U.S. Department of Defense at Travis Air Force Base through an existing or new non-regulated affiliated company under the requirements of Decision 10-10-019.

4. If California Water Service Company (Cal Water) wishes to serve customers in areas outside of the geographic area covered by the terms of its contract with the U.S. Department of Defense to serve the Travis Air Force Base (AFB) and/or adjacent to the Travis AFB, Cal Water shall file a new application with the Commission for this purpose.

5. The December 26, 2017 motion of the Office of Ratepayer Advocates for evidentiary sanctions is denied as moot.

6. All rulings of the assigned Commissioner and assigned Administrative Law Judge in this proceeding are hereby affirmed.

7. Application 17-05-022 is closed.

This order is effective today.

Dated _____, at San Francisco, California.